IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 489

PITTSBURGH PLATE GLASS COMPANY,
*Petitioner,*

*vs.*

UNITED STATES OF AMERICA.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.*

## REPLY BRIEF FOR THE PETITIONER.

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April 24, 1959

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### Argument.

The Government states the issue incisively in its brief (p. 30):

> "There is no need to deny that many of the considerations which led this Court in *Jencks* to order production of the informers' statements also tend to support petitioners' claim that they are entitled to equally free access to a witness' prior grand jury testimony. But there is here present an important countervailing consideration which was absent in *Jencks*: the 'long-established policy that maintains the secrecy of the grand jury proceedings in the federal court' (*United States* v. *Procter & Gamble*, 356 U. S. 677, 681)."

Indeed there are aspects of grand jury proceedings which the law cloaks in secrecy. They and the reasons for them are discussed in our main brief at pages 16-21. These historical reasons for secrecy, as we there show, do not apply at all to the case of the witness who has testified at the trial. Baseless speculation (1) that "the witness would be inclined to tailor his testimony, not to the grand jury's needs, but with a view to the probable scope of his public cross-examination in a future trial" (Gov't. Br., p. 25) or (2) that the participation of the grand jurors in their secret sessions would be less free (Gov't. Br., pp. 26-27) cannot bring this case within those reasons. The Government asks this Court to balance the policy of grand jury secrecy against the policy of "making available to the defendant 'evidence relevant and material to his defense' (*Jencks* v. *United States*, 353 U. S. 657, 667)" (Gov't. Br., p. 36). In truth there is nothing to balance. In a *Jencks* situation, the reasons for the policy of grand jury secrecy have ceased to exist.

1. The Government contends that the ends of justice according to the standards enunciated in *Jencks* may not be pursued in this case because of a "countervailing consideration"—"the long-established policy that maintains the secrecy of grand jury proceedings in the federal courts" (Gov't. Br., p. 30). Thus it contends that grand jury witnesses would not testify fully if they did not have the "assurance of secrecy as a means of encouraging frank disclosure" (Gov't. Br., p. 25). But a grand jury witness cannot in the nature of things have such assurance and never has had. One reason is that he knows the *Government* may call him at the trial and, using the grand jury transcript, make him restate anything and everything he said to the grand jury. With this knowledge, why would a witness dis-

close more before a grand jury than he expected to disclose at a subsequent trial?

It is well known by bench and bar that if a transcript of testimony is made in any particular grand jury proceeding, it is because the Government so determines. No law requires such a transcript. The Government engages the stenographer and retains possession of the transcript. If the Government wishes to assure witnesses that their grand jury testimony will never be disclosed, the Government need but refrain from making the transcript. But having made a transcript for its own use in preparing for the trial, and to insure that the grand jury witnesses will testify as expected at the trial, the Government may not bar a defendant with a particularized need from access to that transcript.

2. The Government suggests that "grand jurors often participate actively in the investigation" and that they would be inhibited by the thought that their "observations and views" might come to light at the trial (Gov't. Br., p. 27). This speculation of the Government's on its face is unreal. The petitioner here, for example, would have no objection to deletion of the names of grand jurors from the transcript. At any rate, this matter, like protection of the reputation of innocent persons (Gov't. Br., p. 26), falls within what may be a substantial category of questions as to how the transcript should be used—all to be controlled by the Court on remand as was stated in *Jencks*, 353 U. S. 657, 669:

> "Only after inspection of the reports by the accused, must the trial judge determine admissibility—e.g., evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant."

Petitioner's motion to inspect the grand jury transcript was confined to the testimony of Jonas, the principal witness. The Government called Jonas to appear before the grand jury on three occasions. The Government caused a transcript of his testimony to be made. The Government called Jonas at the trial. Jonas was not only a self-confessed conspirator, whose company was not indicted, but also the only witness whose testimony in any way purported to connect PPG to the alleged conspiracy. Having called the witness Jonas at the trial, thereby removing any possibility of secrecy as to the subject matter of his grand jury testimony repeated at the trial, the Government is in a poor posture to raise the issue of secrecy to shield him from effective cross-examination in this case.*

The Government urges this Court to adopt the narrow rule expressed in the Court below: that the trial court should make the inspection, but limited to "particular point[s] sharply in issue", and then only for the purpose of determining whether significant inconsistencies appear (Gov't. Br., pp. 39, 46). Such a rule denies, *pro tanto*, the right of the accused to counsel to determine what material in the prior testimony is pertinent on cross-examination to the accused's defense.

We submit that while the Court has discretion under Rule 6(e) to grant inspection of grand jury transcripts, the exercise of this discretion must necessarily be in accordance with the standards of the ends of justice as exemplified in *Jencks*. These standards are summarized in our

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* We note that the Government criticizes our previous cross-examination as inadequate (Gov't. Br., pp. 14, 20, 43). One does not ask a hostile witness to elaborate to the jury in the absence of an effective weapon for impeachment. Obviously notes of Government counsel are not such a weapon (R. 251-2); see the Government's brief in *Lev et al.* v. *United States*, Nos. 435-7, pages 22-23, 50-61.

main brief, pages 14-16. In the circumstances of this case the failure of the trial court to observe these standards was clearly reversible error.

It is apparent from the insubstantial nature of the Government's arguments that the real basis for its opposition to production of Jonas' grand jury testimony is not regard for the proper function of the grand jury. The Government simply wishes to keep grand jury testimony as its exclusive tactical weapon at the trial. In our democracy, however, fairness in the administration of criminal justice takes a high rank. We acquiesce in the inquisitorial powers of the grand jury because of the social need to discover evidence of crime. But to permit the Government to extend the inquisition into the public courtroom claiming the right to use for the prosecution relevant and material evidence which it withholds from the accused for his defense—this would be retrogression.

## Conclusion.

Accordingly, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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